COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Complaint of WorldCom Technologies, Inc. against New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts	D.T.E. 97-116

AT&T'S COMMENTS IN PARTIAL SUPPORT FOR VERIZON'S MOTION TO RE-OPEN THIS PROCEEDING.

Introduction.

AT&T Communications of New England, Inc. submits these comments on behalf of itself and its affiliated companies (including Teleport Communications-Boston, Inc., Teleport Communications Group, and ACC National Telecom Corp.) (collectively "AT&T"). AT&T agrees with Verizon that it would be appropriate and most efficient for the Department to re-open this docket and resolve open issues of contract interpretation without the need for further Federal District Court proceedings. The Department stated in its July 18, 2002, Objection filed in Federal Court that if the case were remanded it should be permitted to act "upon a blank slate," and conduct a *de novo* review of the meaning of the relevant interconnection agreement ("ICA") provisions. AT&T supports this position, and suggests that it makes equal good sense if the proceeding is re-opened by the Department at its own initiative rather than as a consequence of a Federal Court order.

Recent Federal Communications Commission ("FCC") rulings make clear that an ICA which ties intercarrier compensation obligations to the scope of local calling under an ILEC's state tariff, in a state where that tariff treats calls to Internet service providers ("ISPs") as local, as a matter of contract subjects such ISP-bound calls to reciprocal compensation. The ICAs of TCG and ACC, like the MFS/WorldCom ICA, fall into this category. In light of this new FCC

guidance, and in accord with Verizon's motion, AT&T urges the Department to re-open this proceeding in order to accept evidence and argument regarding the extent to which ISP-bound calls are treated as local calls under Verizon's Massachusetts Tariff No. 10, and regarding the implications of that treatment for Verizon's existing and continuing contractual obligations to pay reciprocal compensation on calls specified in Verizon's various ICAs.

Comments.

I. RE-OPENING THE DOCKET IS APPROPRIATE, SO THE DEPARTMENT MAY REVIEW EVIDENCE AND ANALYZE ICA PROVISIONS THAT REFERENCE MASSACHUSETTS TARIFFS, AND THUS DO NOT IMPLICATE FCC JURISDICTIONAL PRONOUNCEMENTS.

A. THE RELEVANT ICA PROVISIONS INCORPORATE DPU TARIFF 10 TO DEFINE THE LOCAL TRAFFIC SUBJECT TO RECIPROCAL COMPENSATION.

The Department's prior rulings in this docket have all been based on then-current FCC decisions regarding whether ISP-bound calls are jurisdictionally interstate or intrastate. This fundamental point is clear from the rulings themselves, and is underscored by the Objections recently filed by both the Department and Verizon with the Federal Court. *See* Department's Objection at 7-10; Verizon's Objection at 7-10. In the Department's words, through each of its orders in this docket "the Department's conclusion has remained unchanged: that federal law, at least in its current incarnation, does not recognize ISP traffic as a species of 'local traffic' such as would be entitled to reciprocal compensation." Department's Objection at 10. As discussed below, this analysis has been misplaced because the ICAs at issue here link Verizon's obligation to pay intercarrier compensation to the traffic defined as local within Verizon's Massachusetts tariffs, and do not link this obligation to any jurisdictional determination by the FCC.

The Department's recent legal brief to the Federal Court argues that the Department acted properly in following the FCC's jurisdictional decisions regarding ISP-bound traffic, because existing ICAs purportedly "contain language directing that the scope of reciprocal compensation

availability would hinge upon the definition of that term under federal law – both in the Act and in federal administrative rulings construing it." Department's Objection at 12. The basis for this assertion is that according to § 5.3 of the WorldCom and GNAPs ICAs the term "Reciprocal Compensation" "was a term of art to be construed 'As Defined in the Act," meaning the Federal Telecommunications Act. Department's Objection at 5.

These assertions by the Department's legal representatives are incorrect, because they ignore the actual substantive provisions of the relevant ICAs. As the Department recognized in its very first decision in this proceeding, the relevant substantive provisions in these ICAs do not refer or tie into the contractual definition of "Reciprocal Compensation." Instead, they are tied to Verizon's Massachusetts retail tariff, as follows:

> Section 5.8.2 of the Agreement states that "the parties shall compensate each other for transport and termination of Local Traffic in an equal and symmetrical manner at the rate provided in the Pricing Schedule." "Local Traffic" is defined in the Agreement as "a call which is originated and terminated within a given LATA, in the Commonwealth of Massachusetts, as defined in DPU Tariff 10, Section 5…" D.P.U. 97-62, Agreement, § 1.38.

See DTE 97-116 at 10 (Oct. 21, 1998). In the TCG ICA, these same provisions appear as § 5.72 and § 1.40 respectively, each of which refers to DPU Tariff 10, Section 6 and not to Federal law. The ACC ICA has similar provisions with the same substantive effect. Section 7.2 states that "[t]he Parties shall compensate each other for transport and termination of Local Traffic in an equal and symmetrical manner at the rate provided in the Pricing Attachment." In Section 1.1.41 the phrase "Local Traffic" is defined as "calls placed within a local calling area as defined in DPU Tariff 10, Part A, Section 6."

As discussed below, the fact that the relevant ICA provisions refer to DPU Tariff 10 is very significant. Indeed, the ICAs go even further and incorporate the then-current versions of DPU Tariff 10 into the ICAs themselves by reference. Section 29.21 of the TCG ICA provides

in part that "any Schedules, Exhibits, tariffs, and other documents or instruments referred to herein are hereby incorporated in this Agreement by reference as if set forth fully herein…." Similarly, Section 42.17 of ACC's ICA provides in part that "any Attachments, Exhibits, and other documents or instruments referred to herein … are incorporated into this Agreement by reference …."

To date, the Department has never taken evidence regarding or considered the significance of the ICA provisions that impose intercarrier compensation obligations with respect to Local Traffic defined by reference to then-existing Bell Atlantic-Massachusetts tariffs. The Department should re-open this proceeding to do so, because otherwise it will not have discharged its obligation to construe the existing ICAs.

B. RECENT FCC GUIDANCE MAKES CLEAR THAT VERIZON OWES RECIPROCAL COMPENSATION WHERE, AS HERE, AN ICA IMPOSES THAT OBLIGATION FOR TRAFFIC TREATED AS LOCAL UNDER A STATE TARIFF AND VERIZON RATES ISP-BOUND CALLS AS LOCAL UNDER THAT TARIFF.

In two recent decisions involving Verizon, the FCC has made clear that ICA provisions imposing intercarrier compensation obligations by reference to state tariffs should be read to reflect the scope of what constitutes local calling under those tariffs. In both cases the FCC found that existing ICAs require Verizon to pay reciprocal compensation for the delivery of ISP-bound traffic, on the basis of tariff language very similar to that at issue here in Massachusetts. *See In the Matter of Cox Virginia Telcom, Inc. v. Verizon South Inc.*, File No. EB-01-MD-006, Memorandum Opinion and Order No. FCC 02-133, 17 F.C.C. Rcd. 8540, 2002 WL 959360 (rel. May 10, 2002) (*"Cox Virginia"*); *In the Matter of Starpower Communications, LLC v. Verizon South Inc.*, File No. EB-00-MD-19, and *Starpower Communications, LLC v. Verizon Virginia Inc.*, File No. EB-00-MD-20, Memorandum Opinion and Order No. FCC 02-105, 17 F.C.C. Rcd. 6873, 2002 WL 518062 (rel. April 8, 2002) (*"Starpower"*).

The ICA in *Cox Virginia* contained the following provisions (see *Cox Virginia* ¶ 22):

- "[T]he parties must pay reciprocal compensation for the delivery of 'local exchange traffic' that is 'originated from [one party] and [terminate to [the other party's] end offices or tandems,' once there is an 'imbalance' of such traffic that 'exceeds plus-or-minus 10%.'"
- "Local Exchange Traffic" is defined as "any traffic that is defined by Local Calling Area."
- "Local Calling Area" means the "Extended Area Service (EAS) and Extended Local Service (ELS) calling area for each exchange as defined in [Verizon South's] local tariff at the date of [the] Agreement."

The FCC therefore found that "the Agreement's definition of compensable 'local exchange traffic ultimately derives from the scope of local traffic under Verizon South's local tariff. Accordingly, whatever traffic is 'local' under the tariff is compensable traffic under the Agreement." *Id.*

The *Starpower* case involved an ICA providing as follows (*see Starpower* ¶ 42):

- It obligated that parties to "reciprocally terminate [Plain Old Telephone Service] calls originating on each others' networks," including "local traffic as defined in [Verizon South's] tariff."
- "Local Service" is defined in that tariff as "[t]elephone service furnished between customer's stations [sic] located within the same exchange area."
- The parties agreed to compensate each other at an "equal, identical and reciprocal rate" for the "termination of local traffic."
- The agreement does not separately define "local traffic" or "termination."

In both cases the FCC concluded that given the ICA's reference to the tariff, "whatever calls Verizon South bills to its customers as local calls under the tariff must be compensable local calls" subject to reciprocal compensation obligations under the Agreement. *Cox Virginia* ¶ 27; *Starpower* ¶ 49. It was undisputed that Verizon treated, rated, and billed ISP-bound traffic as local under its Virginia tariff. *Cox Virginia* ¶ 23; *Starpower* ¶ 45. The FCC therefore ordered Verizon in each case to pay reciprocal compensation under its ICA for the delivery of ISP-bound traffic. *Cox Virginia* ¶¶ 23, 27; *Starpower* ¶¶ 45, 49. Significantly, the FCC rejected Verizon's

arguments that general FCC rules or orders superceded the plain intent of the ICAs themselves, where the parties by contract opted to apply state tariffs. The primacy of contracted-for terms contained in ICAs negotiated under the Telecommunications Act is itself a principle of Federal law. *See, e.g.,* 47 U.S.C. § 252(a)(1). Indeed, the FCC has emphasized that "there was no controlling federal law mandating a particular compensation arrangement for ISP-bound traffic," and that the FCC had "explicitly allowed the parties to negotiate regarding the issue and settle on whatever compensation terms they deem appropriate." *Starpower* ¶ 48; *see also Cox Virginia* ¶ 26.

AT&T submits that when the Department takes a fresh look at the ICAs at issue here it should reach similar conclusions. First, as discussed in the preceding section, the TCG and ACC ICAs for Massachusetts provided that intercarrier compensation is owed for local calls terminated by either party and defines what constitutes a local call by reference to DPU Tariff 10.[1] Second, in 1996, as today, calls by a BA-MA local exchange customer to an ISP are tariffed and rated as local calls. The Department has already found that "[l]ocal exchange carriers, including Bell Atlantic and MCI WorldCom, charge their customers local rates for calls to ISPs. … Such calls are tariffed as local calls by Bell Atlantic." D.T.E. 97-116 (Oct. 1998).

[1] *Starpower* also addressed two separate ICAs that did not refer to or incorporate state tariffs, but that instead defined the "Local Traffic" on which reciprocal compensation would be paid by reference to the "actual originating and terminating points of the complete end-to-end call," or to the "actual end-to-end jurisdictional nature of each call sent over the trunk." *Starpower* ¶ 26. Based on the unique facts in that case, the FCC found that "each agreement's use of the phrase 'end-to-end' is an incorporation of the Commission's long-standing method of determining the jurisdictional nature of particular traffic." *Id.* ¶ 27. It therefore found that the parties intended for these ICAs to link the reciprocal compensation obligation to the FCC's jurisdictional determinations, and that as a result Verizon did not owe reciprocal compensation for ISP-bound traffic. *Id.* ¶¶ 28 et seq.

But this holding has no relevance to the TCG or ACC ICAs. Since no such "end-to-end" language appears in the TCG or ACC ICAs, they cannot give rise to any claim that such language would indicate an intent to link the intercarrier compensation obligation to jurisdictional questions. To the contrary, they are structured like the Cox Virginia and Starpower ICAs that impose intercarrier compensation obligations for the termination of local calls, as defined by a state tariff.

Cf. D.T.E. 97-116-C at 15-16. Indeed, Bell Atlantic confirmed that it understood ISP-bound calls to be local and subject to reciprocal compensation in May 1996, when it made a filing with the FCC arguing in favor of a reciprocal compensation scheme and against mandatory imposition of bill-and-keep. In those comments, Bell Atlantic expressly recognized that reciprocal compensation would apply to ISP-bound traffic, when it stated that:

> [T]he notion that bill and keep is necessary to prevent LECs from demanding too high a rate reflects a fundamental misunderstanding of the market. If these rates are set too high, the result will be that new entrants, who are in a much better position to selectively market their services, will sign up customers whose calls are predominantly inbound such as credit card authorization centers and internet access providers.

In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Bell Atlantic Reply Comments, dated May 30, 1996, p. 21. *Cf*. D.T.E. 97-116-C at 14-15.

In sum, new FCC guidance makes clear that the Federal Magistrate Judge was correct in concluding that by focusing on whether ISP-bound calls are jurisdictionally intrastate or interstate the Department has not yet addressed the contract interpretation issues raised by the particular language in the ICAs at issue here. The Magistrate Judge's analysis squares fully with the recent FCC orders discussed above. These ICAs define what is local by reference to Verizon-MA's tariff, not by reference to federal law or FCC jurisdictional rulings. AT&T therefore joins Verizon in urging the Department to reopen this proceeding, so that it may resolve still unanswered contract interpretation issues. Though AT&T could initiate its own Federal Court action at this time (see below), it agrees with Verizon that the most efficient way to proceed is for the Department to take a fresh look at these issues "to protect against uncertainty and to bring resolution to the issue without the need for further District Court proceedings." *See* Verizon's Motion to Re-Open, at 3.

C. THE DEPARTMENT SHOULD RE-OPEN THE PROCEEDING TO INVESTIGATE THE MEANING OF THE RELEVANT ICA PROVISIONS IN LIGHT OF THIS NEW FCC GUIDANCE, NOT TO SET OR REITERATE ITS OWN POLICY CHOICES.

As Verizon concedes in its "Motion to Re-Open Dockets," the issue that the Department must now address is whether existing ICAs provide for reciprocal compensation for Internet-bound traffic. The Department seemed to have in mind a very different issue in its July 18, 2002, filing with the Federal Court, where it stated (at page 16) that the Department "remains the proper entity to choose policy direction" with respect to reciprocal compensation and other issues within its jurisdiction. But the question of what existing ICAs require is not a question of "policy direction." Rather, it is a matter of contract interpretation. If the Department re-opens this proceeding, as Verizon has requested and AT&T also recommends, the Department must set aside issues of forward-looking policy direction, and address only the much narrower issue of enforcing language previously negotiated and agreed to by Verizon and found in existing ICAs.

The Department has properly emphasized that it will not act "to save contracting parties from later-regretted commercial judgments." D.T.E. 97-116-C at 27 n.29. Parties must be able to enforce signed ICAs, CLECs must "be able to rely with certainty on their interconnection agreements," and subsequent Department policy decisions do not override negotiated terms in an existing ICA. *See* D.T.E. 98-57 at 20-23 (March 24, 2000). The question that still must be resolved is whether the governing ICA language, with its reference to and incorporation of state tariffs, require that ISP-bound calls be treated as local for purposes of reciprocal compensation just as they are under Verizon's tariff. If Verizon has bound itself by contract to pay reciprocal compensation for ISP-bound traffic, a policy judgment by the Department that a different negotiated outcome would have been a better choice is not relevant and cannot absolve Verizon of its contractual obligations.

II. THE DEPARTMENT MUST TAKE A FRESH LOOK AT ALL ICAS, NOT JUST THOSE OF WORLDCOM AND GNAPS.

Although AT&T agrees with Verizon that this proceeding should be re-opened, Verizon's attempt to limit that re-opening to consideration of "the WorldCom and GNAPs agreements" (Verizon's Motion at 5) is improper. The Department will have to resolve outstanding contract interpretation issues for all affected ICAs, not just those of WorldCom and GNAPs.

Perhaps Verizon thinks, mistakenly, that because to date only WorldCom and Global NAPs have filed federal actions challenging the Department's rulings in this proceeding that the Department cannot or should not also address the ICAs of TCG, ACC, AT&T, or other CLECs. There are at least two reasons why Verizon's attempt to cabin the Department's consideration makes no sense.

First, although the Department began this proceeding because of a complaint by MFS (now WorldCom), it ultimately applied its conclusions regarding the FCC's jurisdictional decisions to all ICAs in the state. Since the Department made general rulings affecting all ICAs (over AT&T's explicit objections), any reversal of those rulings in Federal Court would necessarily affect all ICAs. Thus, by the same token, if the Department opts for a more efficient approach by re-opening this proceeding, it should and indeed must investigate the meaning of all affected ICAs, not just those of WorldCom or GNAPs.

Second, in any case, AT&T remains free to bring its own federal action challenging the Department's past rulings. Like WorldCom and GNAPs, AT&T would bring its claim in federal court under 47 U.S.C. § 252(e)(6). Such an appeal under the Federal Telecommunications Act would be subject to the four-year limitations period set forth in 28 U.S.C. § 1658, because the Telecommunications Act does not specify any different limitations period. *Bell Atlantic-Pennsylvania v. Pennsylvania Public Utility Commission*, 107 F.Supp.2d 653, 668 (E.D.Pa.

2000); *MCI Telecommunications Corp. v. Illinois Bell Telephone Company d/b/a Ameritech Illinois*, 1998 WL 156674, *3-*5 (N.D. Ill. 1998).

If the Department were to re-open this proceeding on the narrow terms sought by Verizon, it would merely force AT&T and all other affected CLECs to bring additional federal claims against the Department. Such further litigation may be unnecessary if the Department re-opens this proceeding to investigate and construe all affected ICAs in light of the new FCC guidance discussed above.

Conclusion.

For the reasons stated above, AT&T respectfully urges the Department to grant Verizon's motion to re-open the proceeding and to conduct a *de novo* review of what reciprocal compensation obligations are imposed by Verizon-MA's existing ICAs.

Respectfully submitted,

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